IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	NO. 91-570-23
	:	
ANTHONY LONG	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. MARCH 17, 2009

Petitioner Anthony Long ("Petitioner") is serving a 360-month term of imprisonment for one count of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. He now seeks the reduction of his drug sentence to reflect Amendments 505, 706 as amended by 711, and 709 to the United States Sentencing Commission Guidelines (the "Guidelines"), which altered § 2D1.1 of the Guidelines. Amendment 505 eliminated the base offense levels of 38, 40, and 42 and replaced these with a revised maximum base offense level of 38. Amendment 706 reduced the sentencing ranges applicable to cocaine base ("crack") offenses to reflect the disparity between crack and cocaine. Amendment 711 made technical changes to the Guidelines in order to properly implement amendments becoming effective November 1, 2007. Amendment 709 addressed the use of multiple offenses and misdemeanor and petty offenses in determining criminal history scores, respectively.

Petitioner also asserts that he is entitled to a sentence reduction under the "safety valve" provision of 18 U.S.C. § 3553(f). Application of the "safety valve" allows a district court to impose a sentence below the statutory minimum provided the defendant meets certain statutory requirements.

Petitioner's motion for a sentence reduction will be denied because Amendments 706 and 709 do not apply, the offense level reduction warranted under Amendment 505 does not ultimately alter Petitioner's sentencing guideline range, and the "safety valve" provision is not available to him.

I. BACKGROUND

Petitioner, and twenty-five other individuals, were charged by an indictment for: (1) conspiracy, in violation of 21 U.S.C. § 841(a)(1) ("Count One"); (2) continuing criminal enterprise, in violation of 21 U.S.C. § 848 (Counts Two, Three, and Four); (3) possession with intent to distribute and distribution of a controlled substance, in violation of 21 U.S.C. § 841(a)(1) (Counts Five through Thirteen and Fifteen through Twenty-one); (4) felon in possession of a firearm, in violation of 18 U.S.C. § 922 (Count Twenty-three); (5) use of a firearm during a drug trafficking crime, in violation of 18 U.S.C. § 924 (Counts Fourteen and Twenty-two); (6) aiding and abetting, in violation of 18 U.S.C. § 2 (Counts Five through Thirteen and Fifteen through Twenty-one); and (7) forfeiture, in violation of

21 U.S.C. § 853 (Counts Twenty-four through Thirty-two).

After a jury trial, Petitioner was convicted on Count One only. At the sentencing hearing following Petitioner's conviction, the Court fixed Petitioner's total offense level at 42 and his Criminal History Category at III. Under these guidelines, the term of imprisonment was 360 months to life. On January 21, 1993, Petitioner was sentenced to 360 months in custody.

II. MOTION FOR RESENTENCING

Petitioner moves, pursuant to 18 U.S.C. § 3582, for a reduction of his sentence because of recent changes to the Guidelines in the treatment of offenses involving crack. Section 3582(c)(2) authorizes the district court to reduce a sentence if "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(1)(ii). The applicable policy statement, § 1B1.10(a), provides that if "the guideline range applicable to th[e] defendant has . . . been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below," a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). U.S.S.G. § 1B1.10(a).

A. Petitioner Is Not Eligible for a Sentence Reduction Under Amendment 706 Because His Sentence Was Based on Possession of Cocaine, not Crack

Petitioner argues that under Amendment 706 he is eligible for resentencing pursuant to 18 U.S.C. § 3582. Petitioner's argument fails because Amendment 706 affects sentences based on crack convictions, but leaves unchanged sentences based on cocaine or another substance.

On November 1, 2007, the United States Sentencing Commission (the "Commission") adopted Amendment 706 to the Guidelines to address what the Commission had come to view as unwarranted disparities in the sentences of defendants who possess or distribute various forms of cocaine. Prior to November 1, 2007, the Guidelines provided for a 100-to-1 ratio in sentences for crimes involving cocaine powder compared to those involving crack.[1] For example, § 2D1.1 of the Guidelines provided the same base offense level for a crime involving 150 kilograms or more of cocaine powder and for one involving 1.5 or more kilograms of crack. U.S.S.G. § 2D1.1(c)(1) (2006).

Under Amendment 706, the ratio between powder and crack sentences has been decreased. For example, 150 kilograms of cocaine powder is now treated as the equivalent of 4.5 kilograms of crack. U.S.S.G. § 2D1.1(c)(1) (2007). However, Amendment 706

[1] This ratio was derived from the 100-to-1 ratio created by Congress in its statutory mandate of minimum sentences for cocaine offenses. See Anti-Drug Abuse Act of 1986, 21 U.S.C. § 841(b)(1) (requiring a five-year mandatory minimum penalty for a first-time trafficking offense involving 5 grams or more of crack, or 500 grams of powder cocaine).

does not apply to sentences based on cocaine or another substance. See e.g., United States v. Fernandez, 269 F. App'x 192, 193 (3d Cir. 2008) (Defendant's sentence was based on heroin rather than crack cocaine and therefore Amendment 706 was not applicable and defendant's § 3582 motion was without merit); United States v. Jones, 294 F. App'x 624, 627 (2d Cir. 2008) (crack-to-powder cocaine ratio is irrelevant because quantity of heroin defendant was responsible for would still trigger same offense level).

Here, Petitioner's applicable guideline range is not affected by Amendment 706. Petitioner was held responsible for over 500 kilograms of cocaine. (PSR ¶ 50.) There is no indication his sentence was based on possession or distribution of crack.[2] Therefore, because Petitioner was not sentenced based on a guideline range affected by Amendment 706, he is not

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[2] Petitioner argues that because the Indictment mentions that the "Junior Black Mafia" ("JBM") organization to which he allegedly belongs distributes "cocaine, crack cocaine and heroin," his conviction is based on distribution of crack and therefore he is eligible for a sentence reduction under Amendment 706. (Ex. A, Petr.'s Traverse to the Government's of Motion for Reduction of Sentence.) Petitioner also points to the mentioning of distribution of crack in two cases involving other members of the JBM conspiracy in support of his position. See United States v. Thornton, 1 F.3d 149, 151 (3d Cir. 1993); United States v. Cobb, 36 F. Supp. 2d 675, 675 (E.D. Pa. 1999).

Petitioner's argument is without merit because his conviction was based on conspiracy to distribute over 500 kilograms of cocaine, not crack, in violation of 21 U.S.C. § 846. (PSR, ¶ 50.) Furthermore, nowhere in the Presentence Report does it mention distribution or possession of crack.

eligible for a sentence reduction.

B. Amendment 709 Does Not Apply to Petitioner's Sentence Because it Is Not Retroactive

Petitioner argues that Amendment 709 applies to reduce his Criminal History Category. His argument fails because Amendment 709 is not applicable retroactively, and even if it were to apply here, Petitioner's prior criminal convictions do not fall within the purview of Amendment 709.

Amendment 709 became effective November 1, 2007. The amendment addresses how multiple prior sentences and misdemeanor and petty offenses are used to determine a defendant's criminal history score. U.S. Sentencing Guidelines Manual app. C supplement (2008). Specifically, the amendment "simplifies the rules for counting multiple prior sentences" and "responds to concerns that [ ] some misdemeanor and petty offenses counted under the guidelines involve conduct that is not serious enough to warrant increased punishment upon sentencing for a subsequent offense." Id. However, Amendment 709 has not been made retroactive and therefore does not apply to sentences imposed before November 1, 2007.[3] United States v. Hidalgo, No. 08-1807, 2009 WL 274928, at *2 (3d Cir. Feb. 5, 2009); see also United

[3] Only amendments listed under U.S.S.G. § 1B1.10(c) have been made to apply retroactively. U.S.S.G. § 1B1.10(a)(1). Amendment 709 is not listed among these amendments and therefore does not apply to sentences imposed before November 1, 2007. U.S.S.G. § 1B1.10(c).

States v. Wood, 526 F.3d 82, 88 (3d Cir. 2008).

Here, Petitioner was sentenced in 1993 before the amendment became effective on November 1, 2007, and therefore is not eligible for a Criminal History Category reassessment.

In any event, even if Amendment 709 were made retroactive, it would neither affect Petitioner's Criminal History Category, nor his ultimate sentencing guideline range. Section 4A1.2(c) of the Guidelines specify that sentences for misdemeanors and petty offenses are counted for purposes of determining Criminal History Category. This section also lists a series of misdemeanors and petty offenses that, along with offenses similar to those listed, only count if the term of probation is "more than one year." U.S.S.G. § 4A1.2(c)(1). Amendment 709 altered the original language of this section, replacing "a term of probation of at least one year" with the current "term of probation of more than one year." U.S. Sentencing Guidelines Manual app. C supplement (2008).

In this case, Petitioner has prior convictions for recklessly endangering another person and simple assault, and recklessly endangering another person and criminal mischief. (PSR ¶ 60, 61.) These offenses are not listed under § 4A1.2(c)(1), nor are they considered similar to any listed offenses in that section.

Application Note 12 of Amendment 709 indicates that the

Sentencing Commission wishes to apply the "common sense" test used in United States v. Hardeman, 933 F.2d 278, 281 (5th Cir. 1991), to determine which offenses are considered "similar" to those listed in § 4A1.2(c)(1). Hidalgo, 2009 WL 274928, at *1. This approach considers the comparison between punishments for the listed offenses and the unlisted offense, the perceived seriousness of the offense based on level of punishment, the elements of the offense, the culpability level, and whether commission of the offense indicates a likelihood to commit the same or other criminal offenses. U.S.S.G. § 4A1.2 n.12(A). The court in Hardeman emphasized the fact that these factors are to be considered in order to determine "whether it makes good sense to include the offense in question in the defendant's criminal history score." 933 F.2d at 281 (emphasis original).

Under the Hardeman-type analysis, Petitioner's prior convictions are not considered "similar" to any listed offense. Petitioner's reckless endangerment convictions might be considered close to careless or reckless driving. However, both offenses involved reckless endangerment of another individual, while the listed offenses do not suggest involvement of other individuals or victims. Petitioner also committed these offenses on his own, and clearly the commission of these offenses indicates a likelihood of recurring criminal conduct. Furthermore, courts "have been reluctant to expand the number of offenses which are 'similar' to those listed." Hardeman, 933 F.2d at 281. These factors militate against considering

Petitioner's prior convictions as "similar" to those listed in § 4A1.2(c).

Therefore, the change in language affected by Amendment 709 does not apply to Petitioner's offenses and does not affect his Criminal History Category determination. As a result, Petitioner's sentencing guideline range remains the same.

C. Petitioner Is Not Entitled to a Sentence Reduction Even After Application of Amendment 505

Petitioner argues that Amendment 505 applies to reduce his offense level and consequently it operates to lower his sentence. Petitioner is correct in that Amendment 505 does apply to his sentence, but the resulting change in offense level does not alter Petitioner's sentencing guideline range.

Amendment 505 became effective November 1, 1994 and deleted offense levels 38, 40, and 42 of the Drug Quantity Table, replacing them with a revised level 38 as the maximum offense level under U.S.S.G. § 2D1.1(c). U.S. Sentencing Guidelines Manual app. C Vol. 1 (2003). This change was made to reflect that "quantity itself is not required to ensure adequate punishment given that organizers, leaders, managers, and supervisors of such offenses will receive a 4-, 3-, or 2-level enhancement for their role in the offense, and any participant will receive an additional 2-level enhancement if a dangerous weapon is possessed in the offense." Id.

Amendment 505 was explicitly made retroactive by Section 1B1.10 of the Guidelines. U.S.S.G. § 1B1.10(c). When determining whether a reduction based on a retroactive amendment applies, a district court substitutes only the amended guideline where applicable, leaving all other guideline application decisions intact as originally determined. United States v. McBride, 283 F.3d 612, 615 (3d Cir. 2002).

In this case, Amendment 505 applies to Petitioner's sentence, reducing his base offense level from 40 to 38. Petitioner was convicted of conspiracy to distribute over 500 kilograms of cocaine in violation of 21 U.S.C. § 846. This amount of cocaine originally resulted in a base offense level of 40. Possession of a firearm resulted in a two level enhancement to 42. A Criminal History Category of III placed Petitioner in a guideline range of 360 months to life imprisonment.

Under Amendment 505, Petitioner is entitled to a reduction of his base offense level from 40 to 38. Petitioner still receives a two level enhancement for possession of a firearm, increasing his final offense level to 40.[4] As discussed

[4] Petitioner argues that this enhancement should not apply because the firearm was found at his residence and was unrelated to the criminal acts. (Petr.'s Br. 9.) Comment 3 to U.S.S.G. § 2D1.1 specifies that the "adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." For example, an unloaded hunting rifle found in the closet of the defendant's residence would not warrant an enhancement. See U.S.S.G. § 2D1.1 cmt. 3. The circumstances here are distinguishable from the example above in that witnesses had seen Petitioner carrying a

above, Petitioner is not entitled to a two level reduction under Amendment 706 because his sentence was based on distribution of cocaine and not of crack. See, Section II(A), supra.

Petitioner's Criminal History Category remains at III. An offense level of 40 and a Criminal History Category of III corresponds to a sentencing guideline range of 360 months to life imprisonment - exactly the same guideline range Petitioner was originally sentenced under. For these reasons, Petitioner, although receiving a base offense level reduction under Amendment 505, is not entitled to a sentence reduction because his guideline range remains the same.

D. Petitioner Is Not Entitled to a Sentence Reduction Through Application of the "Safety Valve" Provision Under 18 U.S.C. 3553(f)

Petitioner's argument that the Court should apply a sentence reduction under the "safety valve" provision of § 3553(f) lacks merit. Section 3553(f) allows a district court to impose a sentence below the statutory mandatory minimum if the defendant meets all five statutory requirements. 18 U.S.C. § 3553(f); United States v. Kellum, 356 F.3d 285, 289 (3d Cir. 2004); see also United States v. Veloz, No. 07-2900, 2009 WL

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gun, (PSR ¶ 40), members of the JBM routinely carried firearms, (PSR ¶ 51), and a gun was found in Petitioner's house at the time of his arrest, (PSR ¶ 51). This evidence does not indicate "it is clearly improbable that the weapon was connected with the offense."

74354, at *3 (3d Cir. Jan. 13, 2009). These requirements are:

> (1) the defendant does not have more than one criminal history point, as determined under the sentencing guidelines; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager or supervisor of others in the offense, . . . and was not engaged in a continuing criminal enterprise . . . and; (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct . . . .

18 U.S.C. § 3553(f)(1)-(5).

The requirements under § 3553(f) are not advisory - underlying circumstances of prior sentences are not considered in determining "safety valve" eligibility. United States v. Walker, No. 07-4712, 2008 WL 5351756, at *2 (3d Cir. Dec. 23, 2008) (stating United States v. Booker, 543 U.S. 220 (2000), does not render the "safety valve" eligibility requirements advisory). Additionally, for the "safety valve" provision to apply, the defendant's calculated sentencing advisory guideline range must be less than the statutory minimum. United States v. Batista, 483 F.3d 193, 199, n.4 (3d Cir. 2007).

The Court recognizes that, since the Supreme Court's decision in Booker, the Guidelines are advisory and unwarranted sentencing disparities can be considered as part of the sentencing calculus. However, Congress's directive that

sentences are final unless reduction would be consistent with the Guidelines policy statements is controlling. Thus, the Court may not, under § 3582, reduce Petitioner's sentence when the applicable Guideline range has not been addressed by any amendment under U.S.S.G. § 1B1.10. See, e.g., Carrington v. United States, 503 F.3d 888, 890-91 (9th Cir. 2007) (finding Booker is not pari passu with an amendment to the Guidelines sufficient to provide a basis for reducing a defendant's sentence under § 3582(c)(2)); United States v. Carter, 500 F.3d 486, 490-91 (6th Cir. 2007) (same); McMillan v. United States, 257 F. App'x 477, 479 (3d Cir. 2007) (not precedential) (same); Cortorreal v. United States, 486 F.3d 742, 744 (2d Cir. 2007) (holding Booker cannot be the basis for a reduction of sentence under § 3582(c)(2)). The "safety valve" provision is not an amendment addressing Petitioner's guideline range, and therefore he is not entitled to a sentence reduction through application of this provision.

Even if this Court were able to apply the "safety valve" provision at this time, Petitioner would not meet all of the requirements. Petitioner has more than one criminal history point (even without counting his two convictions for recklessly endangering another person and simple assault, and recklessly endangering another person and criminal mischief), and he possessed a dangerous weapon in connection with the offense.

Additionally, Petitioner's calculated sentencing guideline range (360 months to life imprisonment) is not less than the statutory mandatory minimum for Count One (ten years). Therefore the provision does not apply and Petitioner is not entitled to a sentence reduction.

III. CONCLUSION

For the reasons stated above, Long's motion for a sentence reduction pursuant to § 3592(c)(2) will be denied. An appropriate order follows.

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O R D E R

AND NOW, this **17th day of March 2009**, it is hereby **ORDERED** that, for the reasons set forth in the accompanying memorandum, the motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) (doc. no. 82) is hereby **DENIED**.

AND IT IS SO ORDERED.

S/Eduardo C. Robreno

EDUARDO C. ROBRENO, J.